



6560-50-P

## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 52**

**[EPA-R06-OAR-2018-0673; FRL-9999-17-Region 6]**

### **Air Plan Approval; Texas; Infrastructure for the 2015 Ozone National Ambient Air Quality Standard**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** Pursuant to the Clean Air Act (CAA or the Act), the Environmental Protection Agency (EPA) is approving elements of two State Implementation Plan (SIP) submissions from the State of Texas for the 2015 Ozone National Ambient Air Quality Standard (NAAQS). These submittals address how the existing SIP provides for implementation, maintenance, and enforcement of the 2015 ozone NAAQS (infrastructure SIP or i-SIP).

**DATES:** This rule is effective on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** The EPA has established a docket for this action under Docket ID No. EPA-R06-OAR-2018-0673. All documents in the docket are listed on the <https://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, *e.g.*, Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <https://www.regulations.gov> or in hard copy at the EPA Region 6 Office, 1201 Elm Street, Suite 500, Dallas, Texas 75270.

**FOR FURTHER INFORMATION CONTACT:** Carrie Paige, EPA Region 6 Office, Infrastructure & Ozone Section, 1201 Elm Street, Suite 500, Dallas, TX 75270, 214-665-6521, [paige.carrie@epa.gov](mailto:paige.carrie@epa.gov). To inspect the hard copy materials, please schedule an appointment with Ms. Paige or Mr. Bill Deese at 214-665-7253.

**SUPPLEMENTARY INFORMATION:** Throughout this document “we,” “us,” and “our” means the EPA.

## **I. Background**

The background for this action is discussed in detail in our April 30, 2019 proposal (84 FR 18186). In that document we proposed to approve the August 17, 2018 i-SIP submittal from the Texas Commission on Environmental Quality (TCEQ) for the 2015 ozone NAAQS in its entirety. We also proposed to approve the portions of the August 17, 2018 Transport submittal from the TCEQ for the 2015 ozone NAAQS that address CAA section 110(a)(2)(D)(i), pertaining to the prevention of significant deterioration in other states for ozone (sub-element 3 or prong 3), and CAA section 110(a)(2)(D)(ii). Our proposal did not evaluate the portions of the August 17, 2018 Transport submittal from the TCEQ for the 2015 ozone NAAQS that address sub-elements (prongs) 1, 2, and 4 of CAA section 110(a)(2)(D)(i), but stated that we would address such in a separate action.

We received one comment in support of our proposal and one relevant adverse comment. The comments are posted in the docket for this action. Our responses to the comments are provided below.

## **II. Response to Comments**

*Comment:* The TCEQ submitted a comment in support of EPA's proposed determination that the Texas SIP meets the infrastructure requirements for the 2015 ozone NAAQS as proposed,

and reiterated that prongs 1, 2, and 4 of CAA section 110(a)(2)(D)(i) will be addressed by the EPA in a separate rulemaking.

*Response:* We acknowledge the TCEQ's support of our proposed action.

We received one adverse, relevant comment letter from an anonymous source ("Commenter"). We are separating the comments and our responses to each below:

*Comment:* Commenter asks how the visibility portion of CAA section 110(a)(2)(J) "can be approved" if Texas's visibility portion of CAA section 110(a)(2)(D)(i)(II) (prong 4) "cannot be approved." Commenter also states that EPA must take consistent action on both visibility elements and either approve or disapprove both. Commenter states that EPA cannot take later separate action on one and state that no new requirements are applicable in element (J) when there is a new or revised NAAQS. Commenter questions why states must submit infrastructure SIPs if a new or revised NAAQS requires no new visibility obligations triggered under CAA section 110(a)(2)(J) and, for all other elements, potentially excluding elements (A), (B), (C), and (D)(i)(I), no additional requirements or obligations are placed on states. The commenter asks that if states must revise their SIP for elements (E) through (M), and potentially (A) through (D)(i)(I), why would visibility requirements of element (J) be exempt from this process. The commenter states that EPA must require Texas to address the visibility portion of element (J) unless EPA is willing to exempt other elements from section 110(a)(2) from the need to revise their SIPs under the Infrastructure requirements.

*Response:* In this action, EPA has explained that it is not evaluating and will address in a separate action requirements for Texas under the 2015 ozone NAAQS related to "prong 4," CAA section 110(a)(2)(D)(i)(II)), which generally requires a SIP to contain adequate provisions prohibiting emissions within the state from "interfering with measures required to be in the

applicable implementation plan for any other State under part C of this subchapter . . . to protect visibility.” See Infrastructure SIP Guidance 32-35 (providing guidance on how states may satisfy their prong 4 obligations).<sup>1</sup> EPA considers prong 4 to be “pollutant-specific,” such that an infrastructure SIP submission need only address the potential for interference with protection of visibility based on the pollutant (including precursors) to which the new or revised NAAQS applies. See *id.* at 33. Oxides of nitrogen are ozone precursors subject to the revised 2015 ozone NAAQS and they are also visibility-impairing pollutants. Therefore, EPA acknowledges that we will need to assess prong 4 as related to oxides of nitrogen in the Texas August 17, 2018 Transport SIP submittal for the 2015 ozone NAAQS. However, as EPA makes clear, we are not addressing prong 4 in this action.

We disagree with Commenter that EPA cannot take separate action on CAA section 110(a)(2)(D)(i)(II) prong 4. EPA interprets its authority under CAA section 110(k) as affording the Agency the discretion to approve, disapprove, or conditionally approve, individual elements of the Texas infrastructure and Transport submissions for the 2015 ozone NAAQS. EPA views discrete infrastructure SIP requirements, such as the requirements of 110(a)(2)(D)(i)(I) and (II), as severable from other infrastructure SIP elements and interprets section 110(k) as allowing it to act on individual severable elements or requirements in a SIP submission. In short, EPA has the discretion under CAA section 110(k) to act upon the various individual elements of a state's infrastructure SIP submission, separately or together, as appropriate. As stated in the proposal

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<sup>1</sup> “Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act sections 110(a)(1) and 110(a)(2),” Memorandum from Stephen D. Page, September 13, 2013. Such Guidance is posted in the docket for this rulemaking and also at <https://www.epa.gov/ground-level-ozone-pollution/infrastructure-state-implementation-plan-sip-requirements-and-guidance>.

and earlier in this final action, EPA will address the remaining sub-elements (prongs 1, 2, and 4) of CAA section 110(a)(2)(D)(i) in a separate rulemaking action or actions.

Section 110(a)(2) (J)'s visibility requirements need not be addressed in this i-SIP because a state's requirements relating to visibility protection are not affected when EPA establishes or revises a NAAQS. The visibility sub-element of element (J), CAA section 110(a)(2)(J) is different than for prong 4; the revised NAAQS here does not give rise to additional visibility obligations that would be appropriate to address in an infrastructure SIP. Under 40 CFR part 51 subpart P, implementing the visibility requirements of CAA title I, part C, states are subject to requirements for reasonably attributable visibility impairment, new source review for possible impacts on air quality related values in Class I areas, and regional haze planning. These include timeframes for SIP submittals related to visibility requirements. See, e.g., 40 CFR 51.308(b) (establishing a deadline for initial SIPs to meet regional haze requirements of December 17, 2007). Our proposed action contains the relevant language regarding the visibility sub-element of element (J), and our rationale is not changing from the proposed action to this final action. As EPA recognized in the 2013 Infrastructure SIP Guidance, generally speaking, when the EPA establishes or revises a NAAQS, the visibility requirements under part C of title I of the CAA do not change. See Guidance at 54-55. There are no new visibility protection requirements under part C as a result of the revised NAAQS here. Therefore, there are no newly applicable visibility protection obligations pursuant to element (J) applicable in or to Texas, and this sub-element is therefore not being addressed in this action. For this reason, unlike prong 4, EPA does not intend to take action at a later time addressing this sub-element of element (J) for Texas in the context of infrastructure SIP requirements for the 2015 ozone NAAQS.

The lack of newly applicable obligations is not an exemption from meeting visibility requirements of the CAA. In fact, EPA, Texas, and other stakeholders have been engaged in a series of ongoing actions, rulemakings, and litigation related to the State's visibility obligations for the first regional haze planning period under subpart P. See generally EPA's Fourteenth Status Report on Remand, *Texas v. EPA*, No. 16-60118 (5th Cir. May 30, 2019) (briefly summarizing recent history of actions related to regional haze in Texas).<sup>2</sup> Furthermore, Texas and other states are in the process of developing SIPs for the second planning period, which are due to EPA July 31, 2021. See Final Rule, Protection of Visibility: Amendments to Requirements for State Plans (82 FR 3078, January 10, 2017). It is wholly appropriate for EPA to apply the 2013 Guidance here to conclude that in the absence of any new visibility obligations occasioned by the 2015 ozone NAAQS, Texas' infrastructure SIP need not address pre-existing visibility obligations already being addressed in those separate, ongoing actions.

Commenter also generally questions EPA's guidance that some elements in CAA section 110(a)(2) are to be included in infrastructure SIPs while the visibility sub-element of element (J), are not. EPA's views on the appropriate treatment of the various requirements of section 110(a)(2) are generally set out in the 2013 Guidance cited above. EPA has explained above the basis for its treatment of the prong 4 and the visibility sub-element of element (J) in this action, which is consistent with the Guidance as well as the facts and circumstances related to this revised NAAQS for Texas.

*Comment:* Commenter states that EPA must conduct a more detailed financial accounting of the State's finances and staffing needs. Commenter states that EPA cannot take the State's word and the onus should not be on the public to disprove the State's statements on financial security

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<sup>2</sup> Status Report is posted in the docket for this rulemaking.

or staffing requirements. Commenter states that EPA is responsible for determining whether the State has the necessary staffing and funding to implement the SIP under section 110(a)(2)(E) and (L).

*Response:* We disagree with Commenter that EPA must conduct a more detailed accounting of the State's finances and staffing needs. Section 110(a)(2) does not require a specific quantitative metric or methodology for determining adequate resources. CAA section 110(a)(2)(E) requires that the state provide necessary assurances that it will have adequate funding under state law to carry out the SIP. As described in our TSD, to address adequate funding, the Texas statute charges the TCEQ with preparing and developing the SIP and provides the agency with "[...] powers necessary or convenient to carry out its responsibilities" (see Texas Health and Safety Code (THSC) Title 5, Subtitle C, Chapter 382). To address funding, the Texas statute provides that "[t]he commission shall request the appropriation of sufficient money to safeguard the air resources of the state" (see THSC 382.0622). As cited in our TSD, these State statute-assured funds are supplemented by Federal funds, including CAA section 103 and section 105 grants. Consequently, there are additional monetary sources which contribute to Texas' ability to provide adequate personnel and funding to implement the SIP for the 2015 ozone NAAQS.

Section 110(a)(2)(L) requires SIPs to require each major stationary source to pay permitting fees to cover the cost of reviewing, approving, implementing and enforcing a permit. As described in our TSD, Texas statute provides TCEQ the authority to collect fees for applications, permits, and inspections (see THSC section 382.062) and thus receives fees for such, as well as for penalties and interest on fees owed. Texas requires that applicable sources meet the requirements in 30 TAC 116, Subchapter B, which includes permit fees and establishes the fee

schedule for permits by rule (see 30 TAC 106, Subchapter B, Section 106.50, approved into the Texas SIP at 74 FR 11851, March 20, 2009). State rules that address determination and payment of fees, prevention of significant deterioration (PSD) permit fees, renewal application fees, and fees for standard and flexible permits are approved in the Texas SIP (see 74 FR 11851 and 80 FR 42729, July 20, 2015). State rules that address fees for electric generating facilities (see 76 FR 1525, January 11, 2011), small business stationary source permits, pipeline facility permits, and existing facility permits are also approved in the Texas SIP (see 79 FR 577, January 6, 2014). In addition, Texas statute provides TCEQ authority to collect fees for vehicle inspection and maintenance programs in several nonattainment areas and in the Austin area (see THSC sections 382.202 and 382.302) and these rules are approved in the Texas SIP (see 70 FR 45542, August 8, 2005 and 81 FR 69684, October 7, 2016).

Finally, Commenter provides no evidence to support their concerns regarding the State's submittal addressing CAA sections 110(a)(2)(E) and (L). As described in our proposal, TSD, and previously in this response, the EPA's evaluation and approval of adequate resources for Texas are based upon various sources of funding, state statutes and rules pursuant to section 110(a)(2). We do not understand Commenter's concern regarding the State's "statements on financial security or staffing requirements" since such documentation was neither required nor submitted.

### **III. Final Action**

We are approving the August 17, 2018 Texas i-SIP submittal for the 2015 ozone NAAQS in its entirety. We are also approving the portion of the August 17, 2018 Texas Transport submittal for the 2015 ozone NAAQS that addresses CAA section 110(a)(2)(D)(i), pertaining to the prevention of significant deterioration in other states for ozone, and CAA section

110(a)(2)(D)(ii). Our final action on the specified CAA section 110(a)(2) elements is detailed in Table 1, shown below.

Table 1: Final Action on Texas Infrastructure and Transport SIP Submittals for the 2015 Ozone NAAQS

Element	Final Action
(A): Emission limits and other control measures	A
(B): Ambient air quality monitoring and data system	A
(C)(i): Enforcement of SIP measures	A
(C)(ii): PSD program for major sources and major modifications	A
(C)(iii): Permitting program for minor sources and minor modifications	A
(D)(i)(I): Contribute to nonattainment/interfere with maintenance of NAAQS (sub-elements 1 and 2)	SA
(D)(i)(II): PSD (sub-element 3)	A
(D)(i)(II): Visibility protection (sub-element 4)	SA
(D)(ii): Interstate and international pollution abatement	A
(E)(i): Adequate resources	A
(E)(ii): State boards	A
(E)(iii): Necessary assurances with respect to local agencies	A
(F): Stationary source monitoring system	A
(G): Emergency power	A
(H): Future SIP revisions	A
(I): Nonattainment area plan or plan revisions under part D	+
(J)(i): Consultation with government officials	A
(J)(ii): Public notification	A
(J)(iii): PSD	A
(J)(iv): Visibility protection	+
(K): Air quality modeling and data	A
(L): Permitting fees	A
(M): Consultation and participation by affected local entities	A

Key to Table:

A: Approved;

+: Not germane to infrastructure SIPs;

SA: EPA to address this infrastructure requirement in a separate rulemaking action.

#### IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because SIP approvals are exempted under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

**List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Ozone.

Dated: September 16, 2019.

**David Gray,**  
*Acting Regional Administrator, Region 6.*

40 CFR part 52 is amended as follows:

**PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS**

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

**Subpart SS – Texas**

2. In §52.2270, the second table in paragraph (e), titled “EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP,” is amended by adding the entry “Infrastructure and Interstate Transport for the 2015 Ozone NAAQS” at the end of the table to reads as follows:

**§52.2270 Identification of plan.**

\* \* \* \* \*

(e) \* \* \*

**EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP**

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/effective date	EPA approval date	Comments
* * * * *				
Infrastructure and Interstate Transport for the 2015 Ozone NAAQS	Statewide	8/17/2018	<b>[Insert date of publication in the Federal Register], [Insert Federal Register citation]</b>	Approval for CAA elements 110(a)(2)(A), (B), (C), (D)(i)(II) (portion pertaining to PSD), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M).

[FR Doc. 2019-20314 Filed: 9/20/2019 8:45 am; Publication Date: 9/23/2019]